

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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GINA PRINCE Successor Trustee of the Naida  
Byers Declaration of Trust dated January 25, 2006,  
WAYNE B. LAYLIN, and PATRICIA E.  
LAYLIN,

UNPUBLISHED  
October 15, 2013

Plaintiffs/Counter-Defendants-  
Appellants,

v

STEVEN WEDEMEIER and SHIRLEY  
WEDEMEIER,

No. 312376  
Cass Circuit Court  
LC No. 11-000834-CK

Defendants/Counter-Plaintiffs-  
Appellees.

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Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

In this property dispute, Gina Prince, Successor Trustee of the Naida Byers Trust, Wayne Laylin, and Patricia Laylin (plaintiffs) appeal as of right a trial court order denying in part and granting in part their motion for summary disposition and an order dismissing their prescriptive easement claim. For the reasons set forth in this opinion, we affirm the trial court's order concerning plaintiffs' motion for summary disposition, vacate the order dismissing plaintiffs' prescriptive easement claim, and remand for further proceedings.

**I. FACTS**

This dispute centers around parcels of property located in the Swisher's Landing subdivision in Cass County. Lots 16 and 17 are vacant frontlots in the subdivision that have frontage on Dewey Lake. "Swisher's Landing No. 1" is a subdivision located across the street from Swisher's Landing and it contains all "backlot" parcels. Some of the original deeds conveying the backlots in Swisher's Landing No. 1 contained an express easement for ingress and egress to the lake across Lot 17 and part of Lot 16 as follows:

An easement of right-of-way by foot passage over the following parcels:  
Lot Seventeen (17) and the West side of Lot Sixteen (16) making in all fifty-nine  
(59) feet wide more or less.

In 1955, William and Naida Byers purchased Lot 34 in Swisher's Landing No. 1, and then later acquired several other adjoining backlots in that development (Byers' properties). William and Naida resided at a residence on one of the lots. All of the Byers' properties had the benefit of the express easement. William died in 1986 and Naida died in 2011, and the Byers' properties are currently owned by the Naida Byers Trust (the Trust).

In 1972, plaintiff Patricia Laylin, the daughter of William and Naida, and her husband plaintiff Wayne Laylin acquired Lots 31 and 32 (Laylin property) in Swisher's Landing No. 1. These lots had the benefit of the express easement.

From 1986 to 2001, Karen Daley and her husband owned a lot (Lot 30) in Swisher's Landing No. 1 next to the Laylins. Robert and Mary Lou Lysaught lived next door to the Daleys for a time and they owned Lots 27, 28 and 29. In May 2000, the Lysaughts conveyed Lots 27, 28, and 29 to defendants. These lots also had the benefit of the express easement.

Meanwhile, the title to Lots 16 and 17 became clouded over the years and there were two separate actions to quiet title in the trial court. Finally, in 2010, the trial court quieted title to Lots 16 and 17 in favor of Sandra Northrop and Nancy Jarvis, heirs to the original platters of Swisher's Landing. The record suggests that prior to 2010, neither Northrop nor Jarvis were aware that they owned Lots 16 and 17. On August 26, 2011, Northrop and Jarvis sold Lots 16 and 17 to defendants.

Thereafter, defendants sent the Trust and the Laylins a letter informing them that, pursuant to the plain terms of the express easement, they were only permitted ingress and egress to Dewey Lake via a footpath. Defendants informed plaintiffs that no other use of Lots 16 and 17 was permitted and that "No structures, docks, piers, mooring of boats, storage of any personal property, watercraft or other items" was permitted. Plaintiffs then commenced this action to quiet title. Plaintiffs alleged that, in addition to the express easement, they had continuously used Lots 16 and 17 "for placement of a seasonal dock, docking materials, sea wall, beach, storage of docking materials, and boats and other attendant uses" for "well over 15 years" and therefore had a prescriptive easement for those purposes. Specifically, plaintiffs alleged that the Trust's continuous use of the land for those purposes commenced in 1956, while the Laylins' continuous use commenced in 1972.

Defendants counterclaimed, requesting the following relief: (1) an order determining that plaintiffs had no rights beyond use of a walkway pursuant to the express easement; (2) an order declaring that defendants owned all fixtures on Lots 16 and 17; (3) compensatory damages for plaintiffs' wrongful actions including trespass; (4) in the alternative, if the court determined that plaintiffs had a prescriptive easement, an order requiring plaintiffs to pay one-half of the property taxes and one-half of all maintenance costs associated with the property.

Plaintiffs and defendants each moved for dispositive relief (plaintiffs under MCR 2.116(C)(10), and defendants under MCR 2.116(I)), but the court substantially denied these motions, only granting judgment to plaintiffs on defendants' demand for tax contribution. Following a two day bench trial, at the close of plaintiffs' proofs, the trial court granted defendants' motion for partial directed verdict on Laylin's easement claim and dismissed

Prince's easement claim on its own accord pursuant to MCR 2.504(B). In a written judgment, the trial court reasoned as follows:

Plaintiffs' uses were not exclusive or hostile, but were permissive. Plaintiff Patricia Laylin testified that everybody used all of the disputed property and on cross examination Plaintiff Wayne Laylin admitted this. No one objected to easement holders using the property or placing a pier. . . .

Plaintiffs presented no evidence in the record of actual notice to the owners. Plaintiffs' uses were permissive uses to which no one objected until Defendants purchased the disputed property and objected to Plaintiffs uses, upon which the uses became adverse and Plaintiffs filed this lawsuit. Plaintiffs cannot expand their use beyond their express grants.

With respect to defendants' counter-claims, the court reasoned that, because plaintiffs' did not have a prescriptive easement, it would not award any "cost-sharing" and it expressly found that defendants owned all of the fixtures on the subject property. In light of the trial court's ruling, defendants' voluntarily dismissed "the remainder of their counter-complaint that sought money damages on additional theories." This appeal ensued.

## II. ANALYSIS

Plaintiffs contend that the trial court erred in denying their motion for summary disposition.

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Trans*, 456 Mich 331, 337; 572 NW2d 201 (1998). "Summary disposition is proper under MCR 2.116(C)(10) if the affidavits and other documentary evidence show that there is no genuine issue concerning any material fact and that the moving party is entitled to judgment as a matter of law." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

There are two ways that a prescriptive easement may be acquired. A prescriptive easement can be established by "a use that is made pursuant to the terms of an intended but imperfectly created servitude," when all the other requirements are met. *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 684; 619 NW2d 725 (2000) (quotation omitted). Alternatively, a prescriptive easement may arise in a manner similar to adverse possession resulting from "use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years." *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 118; 662 NW2d 387 (2003). Thus, a prescriptive easement "requires elements similar to adverse possession, except exclusivity." *Id.*; see also *West Mich. Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). It is under this second method that plaintiffs claimed to have gained a prescriptive easement on Lots 16 and 17.

Having reviewed the evidence in a light most favorable to the non-moving party, we conclude that the trial court did not err in denying plaintiffs' motion for summary disposition because genuine issues of fact remained for trial.

Here, with respect to the Byers' use of the property, Patricia Laylin averred in an affidavit that her mother Naida, along with her "permitted family members and agents" used the subject property from 1956 to September 18, 2011, to "maintain and use a dock, store a dock, and store other personal property." In addition, at a deposition, defendant Shirley Wedemeier acknowledged that the Byers' and Laylins maintained a dock on the property, but her testimony was unclear as to when she observed the dock prior to moving into the subdivision in 2010. Further evidence included a 1958 photograph of Patricia Laylin's sister ice skating on Dewey Lake in 1958 that purported to show Naida's dock in "substantially the same location it has been placed each boating season since 1956." Defendants' could only contest Naida's use from 1986 forward. However, summary disposition was not appropriate as to the Byers' use of the property because the proffered evidence lacked specificity about the location and configuration of the dock and the scope of the Byers' use of the dock. Evidence did not show with any specificity where the dock was located or how the Byers' used the dock. The photograph in and of itself would not have allowed the trial court to determine the location and configuration of the dock. See *Village of Manchester v Blaess*, 258 Mich 652, 654-655; 242 NW2d 798 (1932) (a claimant's use of property must be proven with sufficient detail in order to establish an easement by prescription). Further, the evidence was unclear as to the scope of the Byers' use of the dock. There was no evidence regarding the frequency of use, the nature of the boats that were allegedly moored to the dock, or the nature of the personal property that the Byers' allegedly stored on the property. Accordingly, there were genuine issues of material fact that precluded the trial court from granting summary disposition as to the Byers' prescriptive easement claim.

Similarly, there were questions of fact regarding whether the Laylins obtained a prescriptive easement on the subject property. There was evidence that the Laylins maintained a dock on the property. Wayne Laylin testified at a deposition and Patricia Laylin attested in an affidavit that the Laylins maintained a dock and stored a rowboat on the property from 1972 through 2011. Daley acknowledged the presence of the rowboat from 1986 through 2001, but Daley averred in an affidavit that the Laylins "did not use the easement area for lake front activity on a seasonal basis but maybe one of them ventured onto the property once a year except to yell at people." Daley attested that when the Laylins placed a dock in the water, they did not use it except to crowd out other docks. Daley averred that neither the Laylins nor the Byers used the property "on a seasonal basis," and their overall use was "extremely limited." When Daley's affidavit is viewed in a light most favorable to defendants, a trier of fact could have concluded that the Laylins failed to show that they used the land for a specific purpose and that the use was continuous, open and adverse for 15 years.

Furthermore, the evidence was insufficient to establish that the Laylins acquired prescriptive rights for beach purposes, such as lounging or sunbathing on the disputed property. Although Wayne Laylin testified that plaintiffs used the property for recreational purposes, this is too general a statement to establish an easement by prescription. See *Blaess*, 258 Mich at 654-655. Moreover, Daley averred that the Laylins rarely used the property during the 15 years that she lived next door to them. In short, there were questions of fact regarding whether the Laylins

obtained prescriptive rights on the property and the trial court did not err in denying plaintiffs' motion for summary disposition with respect to their prescriptive easement claim.

Plaintiffs contend that the trial court erred in denying their motion for summary disposition with respect to defendants' counterclaims. Although somewhat unclear, defendants requested the following relief in their counterclaim: (1) an order determining that plaintiffs had no rights beyond use of a walkway pursuant to the express easement; (2) an order declaring that defendants owned all fixtures on Lots 16 and 17; (3) non-economic damages for plaintiffs' wrongful actions including trespass; (4) in the alternative, if the court determined that plaintiffs had a prescriptive easement, an order requiring plaintiffs to pay one-half of the property taxes and one-half of all maintenance costs associated with the property.

The trial court did not err in denying summary disposition as to whether plaintiffs had rights beyond the walkway because resolution of that issue turned on whether plaintiffs had a prescriptive easement. Similarly, with respect to the fixtures, the court did not err in denying plaintiffs' motion where there was conflicting evidence regarding the nature of the fixtures and who placed or installed the fixtures on the property.

With respect to defendants' claim for non-economic damages, defendants alleged that plaintiffs "intermittently trespassed . . . and harassed and verbally abused and threatened maintenance contractors and their employees despite repeated requests . . . that they cease and desist. . ." and "interfered with their peaceful use and enjoyment of the Property." Defendants alleged that plaintiffs' actions caused non-economic damages in excess of \$25,000, "pursuant to the authorities in" *Price v High Pointe Oil Co, Inc*, 294 Mich App 42; 817 NW2d 583 (2011), rev'd 493 Mich 238 (2013). Defendants' reliance on *Price* was misplaced because defendants' did not allege negligent damage to real property, let alone any damage to real property. However, in her affidavit, Daley averred that plaintiffs placed their dock in a manner to interfere with other individuals' use of their docks and she attested that plaintiffs often went onto the property to "yell at people using or maintaining the area." Whether plaintiffs' trespassed onto the property turned on whether they had a prescriptive easement, and whether plaintiffs' conduct interfered with defendants' enjoyment of the property involved questions of fact that remained for trial.

With respect to defendants' claim for maintenance costs and tax contribution, the court dismissed the tax contribution claim and neither party appeals that decision. Regarding the maintenance costs, defendants requested an order requiring plaintiffs to pay one-half of the maintenance costs "if the Court awards plaintiffs/counter-defendants any rights beyond a footpath to the water." Whether plaintiffs had any rights beyond the footpath necessarily involved resolution of plaintiffs' prescriptive easement claim which turned on whether plaintiffs' had a prescriptive easement. Therefore, the issue over maintenance costs was not ripe for summary disposition.

In sum, the trial court did not err in denying plaintiffs' motion for summary disposition on defendants' counterclaims.

Next, plaintiffs' contend that the trial court erred as a matter of law when it dismissed their prescriptive easement claim. The trial court granted defendants' partial motion for directed

verdict with respect to the Laylins' claim and then sua sponte dismissed Prince's claim pursuant to MCR 2.504(B). When a defendant moves for a directed verdict in a bench trial, the motion should be treated as a motion for an involuntary dismissal pursuant to MCR 2.504(B)(2). *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 235 n 2; 615 NW2d 241 (2000). Involuntary dismissal is proper when "the trial court . . . sitting as the finder of fact, is satisfied at the close of the plaintiff's evidence that 'on the facts and the law the plaintiff has shown no right to relief.'" *Begola Servs Inc, v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995), quoting MCR 2.504(B)(2). "An action for a prescriptive easement is equitable in nature." *Mulcahy v Verhines*, 276 Mich App 693, 698; 742 NW2d 393 (2007). In equitable actions, we review a trial court's findings of fact for clear error while a court's legal conclusions are reviewed de novo. *Id.*

The trial court dismissed plaintiffs' prescriptive easement claim, on grounds that plaintiffs' use of the property was permissive, was not exclusive, was not hostile, and because plaintiffs did not present any evidence of actual notice to the owners of Lots 16 and 17.

In this case, the court clearly erred in finding that plaintiffs' use of Lots 16 and 17 was permissive. Initially we note that the trial court's factual findings conflicted. The court found that plaintiffs use was permissive and that the owners of Lots 16 and 17 had no actual knowledge of plaintiffs' use of their land. The court did not articulate how the landowners could have given plaintiffs permission to use their land without having any knowledge of plaintiffs' use of the land. Rather, the record is devoid of any evidence to support that plaintiffs used the lots with permission from the owners. In fact, the title to those lots was clouded until 2010 when the trial court quieted title in favor of Northrop and Jarvis, heirs of the original platters. Before that, the record suggests that the heirs had no knowledge that they held title to the lots and Northrop averred in an affidavit that she had no knowledge of plaintiffs' use of the land. Further, the other backlot owners could not give plaintiffs permission to make riparian uses of the disputed property where they did not hold title to the servient estate.

The trial court erred as a matter of law when it held that plaintiffs' could not establish a prescriptive easement because they shared access to the property with other backlot owners and therefore their use was not exclusive. Generally, it is "well established . . . that exclusive use, in the sense of use by only one individual or entity, of another's land is not required to establish a prescriptive easement." *Prose*, 242 Mich App at 679. See *Higgins Lake Prop Owners Ass'n*, 255 Mich App at 118 (noting that a prescriptive easement "requires elements similar to adverse possession, except exclusivity"). Thus, whether other backlot owners made use of the property is not fatal to plaintiffs' prescriptive easement claim.

However, there is a narrow type of exclusivity that a claimant must satisfy in order to establish a prescriptive easement claim. The claimant's use must be exclusive "in the sense that the right does not depend upon a like right in others." *Outhwaite v Foote*, 240 Mich 327, 329; 215 NW 331 (1927). Use of property fails to qualify under this narrow definition of exclusivity if the claimant uses the property "pursuant to another's claim of right." *Prose*, 242 Mich App at 680. Therefore, on remand, the trial court should make findings of fact as to whether plaintiffs' used the lakefront property under another person's claim of right taking into consideration defendants' proofs.

The trial court also clearly erred when it held that plaintiffs' use of the property was not adverse or hostile because other backlot owners used the property with plaintiffs and no one objected to plaintiffs' use. "Use of another's property qualifies as adverse when made under a claim of right when no right exists." *Id.* at 681. On remand, the trial court must make findings of fact as to whether plaintiffs' used the property under their own claim of right when none existed, taking into consideration defendants' proofs.

Finally, the trial court clearly erred as a matter of law in holding that actual notice is necessary to establish a prescriptive easement claim. As noted, an easement by prescription requires proof of open and notorious adverse use of another's land. *Higgins Lake Prop Owners Ass'n*, 255 Mich App at 118. In some rare instances, actual notice of adverse use may be required where a plaintiff claims a right-of-way through unenclosed and wild or vacant land. See e.g. *Du Mez v Dykstra*, 257 Mich 449, 451; 241 NW 182 (1932). Generally, however, the proper inquiry involves examination of "the character of the use and occupancy." *Menter v First Baptist Church of Eaton Rapids*, 159 Mich 21, 25; 123 NW 585 (1909). Uses that occur on the surface of land and are not concealed generally are open and notorious. Cunningham, Stoebeuck, and Whitman, *The Law of Property* 2d 455 (1993). Here, plaintiffs' uses were a substantial invasion into the property rights of the owners and were open and visible to the neighbors in the subdivision. On remand, the trial court should determine whether plaintiffs' use of the land was open and notorious taking into consideration defendants' proofs.

Defendants argue that plaintiffs cannot, as a matter of law, expand an existing right-of-way into a prescriptive easement in order to acquire additional uses beyond those granted in the express easement. This point of law has been used to prevent an easement holder from unreasonably increasing the burden on the servient estate, such as by adding additional parcels to an easement, *Shadewald v Brule*, 225 Mich App 26, 35-36; 570 NW2d 788 (1997), or by adding new uses that were not included in the easement, *Delaney v Pond*, 350 Mich 685, 687-688; 86 NW2d 816 (1957). However, here, plaintiffs' claimed that they "acquired a prescriptive easement to continue use of the Disputed Property" for various riparian uses. Thus, plaintiffs are asserting that they acquired an independent easement by prescription over the property. See e.g. *Prose*, 242 Mich App at 686-687 (allowing the holder of an existing right-of-way to acquire a prescriptive easement over the same property).<sup>1</sup>

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<sup>1</sup> In support of their argument, defendants' also cite *O'Brien v Hicks*, unpublished opinion per curiam of the Court of Appeals, Issued November 20, 2012, (Docket No. 307332), wherein this Court held that backlot owners could not expand the scope of an express easement by prescription. Slip op. at 4. Defendants' argument is misplaced. First, *O'Brien* was unpublished and is not binding on this Court. Second, the express easement at issue in *O'Brien* was broad and dedicated use of certain parkways "to the use of the public" such that the appropriate scope of the easement was debatable. In contrast, this case involves a very specific express easement that granted ingress and egress by footpath. Plaintiffs alleged uses of Lots 16 and 17 clearly exceeded use for ingress and egress by footpath and the uses were clearly adverse.

In sum, the trial court clearly erred when it found that plaintiffs use of the land was permissive, erred in holding that plaintiffs' use of the land needed to be exclusive of other backlot owners, erred in holding that plaintiffs use was not hostile or adverse and erred in holding that actual notice is necessary to establish a prescriptive easement. Therefore, we vacate the trial court's order dismissing plaintiffs' prescriptive easement claim and remand this case for further proceedings. On remand, the trial court should determine whether plaintiffs' submitted the requisite evidence to establish their claim of prescriptive easement in accord with this opinion and the elements set forth in *Higgins Lake Prop Owners Ass'n*, 255 Mich App at 118 (i.e. the elements of a prescriptive easement claim include: "use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years"). To the extent that defendants' proofs would impact proof of any of these elements, the trial court should allow defendants to present their proofs before making the requisite factual findings.<sup>2</sup>

We affirm the trial court's order denying in part and granting in part plaintiffs' motion for summary disposition, vacate the trial court's order dismissing plaintiffs' prescriptive easement claim, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. Neither party having prevailed in full, neither may tax costs. MCR 7.219.

/s/ Christopher M. Murray

/s/ Pat M. Donofrio

/s/ Stephen L. Borrello

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<sup>2</sup> Given that the trial court's ruling on defendants' counterclaims was based on its erroneous ruling on the prescriptive easement claim, and considering that the claims were not dismissed with prejudice, defendants may reassert those claims on remand.